United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 74-1791

United States Court of Appeals

For the Second Circuit.

GAJON BAR & GRILL, INC. and JAMES FRANCIONE,
Plaintiffs-Appellees,

EUGENE KELLY, individually and in his capacity as Police Commissioner of the County of Suffolk, State of New York,
Defendant,

and

PAUL J. FITZPATRICK, individually and as Supervisor of the Town of Smithtown;
VINCENT J. TRIMARCO, individually and as Town Attorney of the Town of Smithtown,
Defendants-Appellants,

and

ROBERT HOSS, individually and as a member of the Suffolk County Police Department; and EMIL ORTOLANI, individually and as a member of the Suffolk Police Department,
Defendants.

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF OF PLAINTIFFS-APPELLEES

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FACTS

Plaintiff, GAJON BAR & GRILL, INC. is a New York Corporation which operates a bar and grill in the Town of Smithtown, State of New York. Plaintiff, JAMES FRANCIONE, is employed as manager of the Corporate Plaintiff. (PP 8a, 11a, 16a, 17a, 52a) GAJON, under the management of FRANCIONE, provides live stage entertainment for their adult customers consisting of topless dancers. (PP 8a, 9a, 13a, 18a, 19a, 21a, 52a, 53a)

On January 23, 1974, the Town of Smithtown enacted Local Law No. 1-1973 (PP 11a, 52a) which makes it unlawful for a person who directs, gives, manages, participates in or prepares, any live public show wherein a female appears with her breasts below the top of the areola not covered by an opaque covering. The Law also makes it unlawful for a female to appear in public clothed in such a manner that her breast below the top of the areola is not covered with an opaque covering. The Local Law is entitled, "Regulation of Entertainment in Public Places" and the operative section of the Local Law is entitled, "Clothing Requirements." (PP 26a, 40-41a)

Plaintiff, GAJON acquired the assets, lease and good will of its predecessor, Sophies Red Velvet Lounge in November, 1972. Topless entertainment had been provided by GAJON'S predecessor and after GAJON was the owner. When topless entertainment was presented, business reached a profitable level. When such entertainment was not presented, business fell below profitable

levels and Plaintiff GAJON began to face financial difficulties. The curtialment of business resulting from compliance with the Local Law is likely to result in the failure of the business and loss of employment by Plaintiff FRANCIONE. (PP 8a-9a, 13a-14a, 21a, 53a, 58a) In March, 1974, Plaintiff FRANCIONE was hired to prevent the failure of GAJON (PP 8a, 13a)

In December, 1971, a topless dancer and two employees of the predecessor of GAJON were arrested at the same premises for a violation of Local Law No. 2-1970 of the Town of Smithtown. The Local Law was essentially the same as the present Local Law at issue. After trial, the dancer was convicted and the two employees acquitted. (PEOPLE v. MOREIRA 70 MISC 2d 68, 333 NYS 2d 215.) (PP 12a, 19a)

On May 2, 1972, and May 23, 1972, Plaintiff FRANCIONE and two different topless dancers were arrested at the same premises for a violation of the aforesaid Local Law No. 2-1970. The issues were presented for trial and the charges were dismissed on January 3, 1973, on the ground that the Town of Smithtown had enacted Local Law No. 2-1970 prior to the effective date of the enabling legilsation of the State of New York. (PP 11a, 19a, 53a) PEOPLE v. SIPE, Dist. Ct. Suffolk Co., Decided January 3, 1973, Index Nos. 3140-A&B-1972, SMO 115 A&B-1972, Lama, J.

Subsequent to the dismissal and on or about January 23, 1973, the Town of Smithtown enacted Local Law No. 1-1973, which is almost identical to Local Law No. 2-1970, in order to reinstate the

local law found to have been enacted without authority. (PP 11a, 26a, 35a, 52a)

On March 16, 1974, at about 1:30 a.m. and again at 1:30 p.m. of the same day at the same premises, then under the ownership of GAJON, Plaintiff FRANCIONE was again arrested along with two different dancers, at the same premises and was charged with a violation of Local Law No. 1-1973. (PP 12a, 20a, 30a, 32a, 36a, 53a Addendum to Appellant's Brief, PP 5-6)

On March 19, 1974, Plaintiff FRANCIONE was again arrested along with a dancer but was later released when it was determined that the dancer, LaFurge, was a male. (PP 12a, 20a, 30a, 38a, 53a)

After Local Law No. 2-1970 was struck down, Defendant FITZPATRICK, Supervisor of the Town of Smithtown, was reported in the news media to have said that he intended to stop topless entertainment in the Town of Smithtown. Subsequent to the March 19, 1974, arrest, Supervisor Fitzpatrick was quoted in the newspapers as having no interest in Smithtown becoming the topless capital of the County and was pleased with the arrests under the Local Law, saying, "We are not interested in this type of entertainment in Smithown; and if the proprietor wishes to provide it, then he should go someplace else and set up shop." (PP 12a-13a, 53a)

QUESTIONS PRESENTED

1. Is Federal intervention warranted under the facts of this case?

2. Is the Local Law involved unconstitutional on its face?

3. Is the Local Law susceptible of a limiting construction as would preserve its constitutionality?

4. Must a three judge court be convened?

POINT I

THE COURT BELOW PROPERLY REFUSED TO ABSTAIN FROM DECIDING THE ISSUE ON THE MERITS

The basic question presented to the Court is whether the principles of DOMBROWSKI v. PFISTER 390 US 479 (1965) and the YOUNGER Doctrine[1] are applicable to the instant case or is abstention required under the YOUNGER Doctrine.

It is the Appellee's contention that under the circumstances of the case before the bar, special circumstances exist as to FRANCIONE and GAJON as not only authorize but require consideration of the merits of the case by the Federal Courts and in the case of GAJON, a genuine threat of enforcement exists so as to bring it within the principles of STEFFEL v. THOMPSON ___ US___, ___94 S. Ct.___, 39 LEd 2d 505 (1974).

In DOMBROWSI, supra, where State criminal proceedings had begun, the Supreme Court stated:

> "But the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedom of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination.

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[1] YOUNGER v. HARRIS 401 U.S. 37 (1971) and its companion cases, SAMUELS v. MACKEL, 401 U.S. 66 (1971); BOYLE v. LANDRY, 401 U.S. 77 (1971); PEREZ v. LEDESMA, 401 U.S. 82 (1971); DYSON v. STEIN, 401 U.S. 200 (1971); BYRNE v. KARALEXIS, 401 U.S. 216 (1971)

These allegations, if true, clearly show irreparable injury." (Emphasis Added)

"When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal will generally assure ample vindication of constitutional rights is unfounded in such cases. See Bagett v. Bullitt, supra, 377 U.S. at 379, for '[t]he threat of sanctions may deter...almost as potently as the actual application of sanctions..." NAACP v. BUTTON, 371 U.S. 415, 433. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression - of transcendent value to all society, and not merely to those exercising their rights - might be the loser."

...

"By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of the particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." DOMBROWSKI v. PFISTER, supra PP 485-487.

YOUNGER in no way overruled DOMBROWSKI. The Supreme Court made it clear that DOMBROWSKI did not stand for the proposition that a Federal injunction could be issued "solely on the basis of showing that the statute 'on its face' abridges First Amendment rights." YOUNGER v. HARRIS, supra. The Court made it clear that something more had to be present and in fact reiterated the proposition that,

> "There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harrassment. For example, as long ago as in the BUCK case, supra, we indicated:
>
> > 'It is of course conceivable that a statute may be flagrantly and patently violative of express Constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' 313 U.S. at 402.
>
> Other unusual situations calling for Federal intervention might also arise, but there is no point in our attempting now to specify what they might be. It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it, and that Appellee Harris has failed to make any showing of bad faith, harrassment, or any other unusual circumstance that would call for equitable relief." YOUNGER v. HARRIS, supra at P. 402.

case might not be prohibited under a proper statute, but rather

YOUNGER made it clear that something more than a "chilling effect" is necessary in order to justify Federal intervention in a pending state proceeding. In the instant case, extraordinary circumstances and bad faith and harrassment have been shown.

It must be remembered that in the YOUNGER case a criminal syndicalism statute which was involved which although affecting directly freedoms guaranteed under the First Amendment, the statute was susceptible of a narrowing interpretation which could possibly preserve its constitutionality. There was no question that the statute did incidently abridge freedom of speech but this was a mere chilling effect as opposed to a threat of irreparable harm, both great and immediate, in the face of a flagrantly unconstitutional statute. YOUNGER v. HARRIS, supra. See also, concurring opinion. YOUNGER in the foregoing quote of the BUCK case clearly reiterates the proposition that an extraordinary circumstances which demonstrates irreparable injury can be shown where the statute is flagrantly and patently violative of a constitutional provision. The Local Law at bar is not a statute, as pointed out in YOUNGER, supra, which is regulating a subject within a state's power and having the incidental effect of inhibiting First Amendment rights. The statute is clearly intended and directed at suppression of First Amendment rights.[2]

A plain reading of the ordinance and its definitions make

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[2]See Appendex I to Appellee's Brief on Appeal.

it clear that this is a sweeping intent to prohibit topless entertainment in any shape or form. In no way can this statute be interpreted as to bring it within the ambit of MILLER v. CALIFORNIA (413 U.S. 15[1973]) under the claim of a state's right to regulate pornography within its borders. There is absolutely no way that this statute can be narrowed to bring it within the powers of a state to regulate excesses of freedom of expression.

The Federal District Court, prior to the institution of this suit, in SALEM v. FRANK ___F. Supp. 2d___ (1974) held a similar statute for the Town of North Hempstead, New York (Local Law No. 1-1973, Town of North Hempstead) to be unconstitutional. The Hempstead Local Law was even more narrowly drawn than is the local law in the instant case. This Court on the SALEM appeal ___F 2d___, 73-2436 June 19, 1974, slip op. 4405 sustained the District Court's preliminary injunction and agreed with the finding that the statute was overbroad.

Further special circumstances exist by reason of the repeated arrests of FRANCIONE (PP 11a, 12a, 19a, 30a, 32a, 36a, 53a) and others under the Smithtown ordinance and similar ordinances and the demogogic statements of Supervisor FITZPATRICK of his intent to eliminate topless dancing in the Town of Smithtown. (PP 12a-13a, 53a) FRANCIONE was arrested on five occasions under this ordinance. On the first two occa-

sions the constitutionality was not considered.[3]

Twice in 12 hours FRANCIONE was arrested for violation of the present Local Law and a third time he was arrested but later released when it was found that the topless dancer, although appearing to be a female, was in fact a male. These arrests coupled with the prior arrests, the statement of Supervisor Fitzpatrick and the fact that the Federal District Court in SALEM had already declared a similar local law unconstitutional, clearly shows bad faith and harrassment on the part of local authorities especially since in the face of the Court's decision in SALEM they could not hope to achieve success in the prosecution. Vindication for GAJON and FRANCIONE cannot be had in a single suit. FRANCIONE has two actions pending and it is clear that were it not for the injunction below further arrests would have been made.

In DOUGLAS v. CITY OF JEANETTE 319 US 157, 165 (1943), the Supreme Court noted that there was no allegation or proof that the Respondents would not acquiesce in the decision of the Supreme Court holding the ordinance to be unconstitutional as applied to the Petitioners. In the instant case, a Federal District Court in this District held a similar local la to be unconstitutional, SALEM v. FRANK, supra yet the local authori-

[3]The statute was struck down by reason of its having been enacted prior to the enabling legislation (Amendment to Penal Law of the State of New York Sections 245.01 and 245.02)

ties proceeded to prosecute FRANCIONE, a clear showing of bad faith enforcement.

In addition, the Appellees, GAJON and FRANCIONE have shown irreparable damage by reason of the financial disaster faced (PP 8a-9a, 13a-14a, 21a, 53a, 58a) and the clear showing of the facial unconstitutionality of the ordinance where the statute in the instant case is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." BUCK v. WATSON 313 U.S. 387, 402.

Further extraordinary circumstances are demonstrated by the fact that on at least two occasions the District Court of Suffolk County has had occasion to consider the constitutionality of the same or similar local law and have found the local laws to be constitutional. In PEOPLE v. MOREIRA 70 MISC 2d 68, 333 NYS 2d 215 which involved a dancer arrested at the same premises, Defendant was found guilty and the ordinance was held to be constitutional. In PEOPLE v. JANOWITZ BA-Cr 688/70 November 27, 1970, District Court, Suffolk County, a similar ordinance of the Town of Babylon was also found to be constitutional. In addition, in BRANDON SHORES, INC. v. VILLAGE OF GREENWOOD LAKE (Sup. Ct.) 325 NYS 2d 957, it was held that a similar local law was found to be constitutional.

Although the matters involving FRANCIONE were to be heard

on submitted facts to obviate a trial, based upon past decisions of the Suffolk County District Court and BRANDON SHORES, INC. v. VILLAGE OF GREENWOOD LAKE, supra, it would appear that final resolution would not come quickly and an appeal would be likely regardless of the outcome in the District Court which would inevitably consume a great deal of time. GAJON and FRANCIONE would be faced with either continually violating the Local Law and suffer repeated arrests or abstaining from presenting topless entertainment in which event the corporate Plaintiff might by the time the matter was resolved, find itself out of business and the Corporation, like Mr. Zwickler, find that the issue was moot because it was no longer in business. (See GOLDEN v. ZWICKLER 394 U.S. 103 [1969]).[4] See also 414 THEATRE CORP. v. MURPHY, 2nd Circuit Court of Appeals, Docket 73-2327, Decided May 17, 1974, Slip op. 3563.

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[4]ZWICKLER was arrested for violation of Section 781-b of the New York Penal Law making it a crime to distribute anonymous campaign literature. He was convicted and on appeal to the Appellate Term, his conviction was reversed on state law grounds and the New York Court of Appeals affirmed the reversal. ZWICKLER in April 1966, had applied to Federal Court for declaratory and injunctive relief as he intended to continue to distribute anonymous handbills. A three judge Court dismissed, applying the doctrine of abstention and the Supreme Court (ZWICKLER v. KOOTA 389 US 241 [1967]) reversed and remanded for further proceedings. On remand, it was held ZWICKLER was entitled to declaratory relief. On Appeal to the Supreme Court, judgment was reversed because at the time of the hearing on remand, the congressman who was ZWICKLER'S target would not again be a candidate for office and therefore a controversy no longer existed. GOLDEN v. SWICKLER, supra.

"In the circumstances of this case, abstention could cause irreparable harm to the Plaintiff and others similarly situated and could thus effectively nullify First Amendment rights. This danger is particularly grave since state proceedings often take many months before they are finished." LONG ISLAND VIET NAM MORATORIUM COMMITTEE v. CAHN 437 F 2d 344, 347 (2nd Cir) Cert. Denied 400 U.S. 956, 91 S. Ct. 353, 27 LEd 2d 264 (1970) Affirmed Sub Nom CAHN v. LONG ISLAND VIETNAM MORATORIUM COMMITTEE ___U.S. ___, 15 CRL 4098 (1974).

Appellant's, officers of the Town of Smithtown, raised the bar of Federal policy of abstention to the case at issue. However, it is clear that the principles of comity which give rise to the policy of Federal abstention was never intended to make this policy absolute, nor is it a bar to suit a Federal Court in proper circumstances. BAGGETT v. BULLIT 377 US 360, 375 (1964).

> "We cannot ignore that lower Federal Courts are the 'primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' STEFFEL v. THOMPSON, 42 U.S. L.W. at 436 (emphasis original) quoting Frankfurter and Landis, the business of the Supreme Court 65 (1928) As such, either in the absence of other considerations or in their equipose, this consideration would tip the scales in favor of Federal rather than State adjudication in the M & L case."[5] SALEM v. FRANK, supra 2nd Cir. Ct. of App. Slip op. P. 4412.

[5] The M & L referred to was a Plaintiff in SALEM v. FRANK, supra against whom State prosecution had been commenced subsequent to the filing of the Salem action but before an injunction had been issued.

The instant case presents a combination of the types of circumstances which have been previously enunciated by the Supreme Court as not only justifying but requiring Federal intervention as opposed to abstention and should weigh heavily on the side of Federal intervention. Any one of the circumstances present in the instant case would be suffficient to justify and warrant intervention. There is irreparable harm; financial loss, the clear intention of the authorities to further arrest FRANCIONE, repeated arrests, failure of the Courts of the State of New York to recognize the unconstitutionality of the statute and the clear facial unconstitutionality of the entire local law.

> "...Congress imposed the duty upon all levels of the Federal judiciary to give due respect to the suitor's choice of the Federal forum for the hearing and decision of his Federal constitutional claims. Plainly, escape from that duty is not permissible, merely because state courts also have the solemn responsibility, equally with the Federal Courts,
>
> > '...to guard, enforce, and protect every right granted or secured by the Constitution of the United States...,' ROBB v. CONNOLLY 111 U.S. 624.
> >
> > 'We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject to adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in

some other forum.'" ZWICKLER v. KOOTA, 389 U.S. 241, 248 (1967).

If this statement and that of the Second Circuit Court of Appeals in SALEM v. FRANK, supra, as to the primary responsibility of the Federal Courts are to have any effect, GAJON, although the employer of FRANCIONE, should not be denied his entry to the Federal Court on mere speculation that his employee's rights may be vindicated and thereby its rights vindicated. It is not necessarily true. The State Court could well avoid the constitutional issue and acquit FRANCIONE for reasons other than the constitutionality of the statute. We have seen the Court do this before. Were it not for the Federal injunction, there would have been nothing to prevent further arrests as to GAJON for the same incidents as was its manager arrested and from the tenor of Supervisor Fitzpatrick's statements (PP 12a-13a, 53a) and past history, an arrest surely would have been made after the arrest of LaFurge. GAJON clearly indicated that it would not present further topless entertainment because of the real threats of prosecution should it or FRANCIONE exercise their constitutional rights.

The statement in STARSHOCK, INC. v. SHUSTED ___F. Supp.___ (U.S.D.C. Trenton, N.J. #1806-73, 7/24/74)

> "That the argument that the Plaintiff Corporation was not indicted so as to distinguish this matter from YOUNGER is pure sophistry."

has absolutely no application to the case at bar. The Court

in its next sentence said,

> "It is the same case and, indeed the same case as CHERBONNIE v. KUGLER, 359 F. Supp. 256 where the operation of this very club was in issue, and the Court there abstained, as I do here." STARSHOCK, INC. v. SHUSTED, supra.

Additionally, the Plaintiffs in STARSHOCK, INC., including the individuals and the corporation, are styled as "owner-managers and/or operators of 'Club Lido' and as noted by Judge Cohen in his opinion and Order in STARSHOCK dated February 8, 1974, referring to the Club Lido

> "...indictments...are pending against the owner, management, and its entertainers..."
>
> "...The instant action, (is) instituted by the Club Lido's owner-managers..."

Neither GAJON BAR & GRILL, INC. nor JOHN KLEIN, its President as operator or owner were charged with any violations. In the instant case, there has been no merger of the Plaintiff's interest so as to deny it the application of YOUNGER.

Where probable success on the merits and irreparable harm if relief is not granted is shown, the primary test for injunctive relief has been met. 414 THEATRE CORP. v. MURPHY, supra.

The Court below properly found the existence of extraordinary circumstances which permits Federal intervention and correctly found that an actual controversy was presented as to GAJON. There is no question that the activities of the local authorities against the employee of the corporation shows a

demonstrable immediate threat of prosecution to the corporate plaintiff should he continue to present topless entertainment.

POINT II

LOCAL LAW NO. 1-1973 OF THE TOWN OF SMITHTOWN, NEW YORK IS UNCONSTITUTIONAL ON ITS FACE

The clear invalidity of Local Law affects both the merits of Plaintiffs' action and Federal authority to intervene.

"Dancing is a form of expression protected by the First Amendment." SALEM INN INC. v. FRANK, supra; See also CALIFORNIA v. LaRUE 409 U.S. 109 (1972); PBIC v. BYRNE 313 F. Supp. 757 (D. Mass. 1970); YAUCH v. STATE App. 175, 505 P. 2d 1066 (1973); IN RE GIANNINI, 69 Cal. 2d 563, 446 P. 2d 535 (1968).

The fact that a dance is performed by a nude performer does not deprive one of First Amendment protection. MANUAL ENTERPRISES, INC., v. DAY, 370 U.S. 478, 490 (1972).

The fact that a profit is derived (WINTERS v. NEW YORK 333 U.S. 507, [1948]) or that the subject matter is designed to entertain (JOSEPH BURSTYN v. WILSON 343 U.S. 495 [1952]) does not deprive it of its constitutional protection under the First Amendment.

> "We do not accede to the Appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propoganda through fiction...What is one man's amusement, teaches another's doctrine." WINTERS v. NEW YORK, supra at p. 519.

The Supreme Court in the WINTERS case struck down New York's then obscenity statute because of vagueness in failing to sufficiently define obscenity. WINTERS v. NEW YORK, supra.

In SMITH v. CALIFORNIA 361 U.S. 147, the Supreme Court struck down a California ordinance which did not provide scienter. The Court clearly drew the distinction between matters which could constitutionally be considered malum prohibitum or malum per se. The area of freedom of speech and expression is not such an area. In showing the distinction with regard to statutes affecting food--malum prohibitum Mr. Justice Frankfurther in his concurring opinion stated:

> "Of course there is an important difference in the scope of the power of a State to regulate what feeds the belly and what feeds the brain...The balance that is struck between this vital principle and the overriding public menace inherent in the trafficking in noxious food and drugs cannot be carried over in balancing the vital role of free speech as against society's interest in dealing with pornography." SMITH v. CALIFORNIA supra.

There is no question that a mere performance or appearance by a female nude from the waist up cannot be prosecuted under the obscenity statutes of the State.

The Local Law in question seeks to evade the criteria established for a prosecution for obscenity by preventing the display of a portion of the female anatomy under any circumstances except for the limited exceptions noted, creating a non-

obscene malum prohibitum form of conduct.

Judge Shapiro, in 1963, in PEOPLE v. BIRCH 243 NYS 2d 525 points out that in medieval times it was a custom for the Queen and her ladies to appear naked from the waist up and expose their private parts to do honor to outstanding personalities went on to say:

> "Such whether we approve or disapprove, is the temper of our times and it is in that light that on must determine whether the books here are obscene for [t]he community cannot, where liberty of speech and press are at issue condemn that which it generally tolerates' SMITH v. CALIFORNIA, 361 US 147, 171, 80 S. Ct. 215, 228, 4 LEd 2d 205
>
> ...In an era of bikinis, which reveal more than they conceal; of cinemas which show females swimming in the nude and which have for their main thesis the art of living well by prostitution and pimping and of newspapers which contain complete and detailed descriptions of the actions of the sexually aberrant, one must legally conclude that these books, in the mores of these days, do not constitute hard core pornography." PEOPLE v. BIRCH, supra.

That the community tolerates nudeness is beyond question. See REDRUP v. NEW YORK 286 US 767; PEOPLE v. RICHMOND COUNTY NEWS 9 NY 2d 578; EXCELSIOR PIC CORP. v. REGENTS OF UNIVERSITY, 3 NY 237, 165 NYS 2d 42; BETHVIEW AMUSEMENT v. JUDGES 332 NYS 2d 42; PEOPLE v. HILTY 324 NYS 2d 164; PEOPLE v. G.I. DISTRIBUTORS, INC. 20 NY 2d 105; UNITED STATES v. I AM CURIOUS YELLOW

2 Cir. 404 F. 2d 1946.

> "The protection of the First and Fourteenth Amendments--and, by implication of our Penal Law, Article 235-8--of course extends to motion pictures, plays and other media (emphasis added) just as they protect books and magazines." PEOPLE v. BERCOWITZ 61 MISC 2d 974, 308 NYS 2d 1, 9, 1970.

In the area of expression through exhibitions and the First Amendment it is only that which is obscene which is not protected by the Constitution. In light of the decisions of the Supreme Court and other Courts, the mere performance in public by a female with naked breasts is constitutionally protected and can by no means be considered obscene.

The State has according to the decisions, the right to prohibit obscenity, but there is no right to prohibit freedom of expression which is not obscene under the guise of a statute which fails to mention obscenity.

The Local Law does not in any way purport to protect the interest of those who do not wish the performance to be thrust upon them, see GINZBURG v. U.S. 383 U.S. 463 (1966). The Local Law is so broad as to prevent legitimate interest without protecting any greater interests and is therefore unconstitutional on its face.

As pointed out in SALEM v. FRANK, supra (2nd Cir. Ct. of Appeals), a case involving a restriction of First Amendment

rights, the issue is not whether the dancing in the particular case might not be prohibited under a proper statute, but rather whether it is overbroad so as to prohibit protected expression. See also PLUMMER v. COLUMBUS ___U.S.___, 38 LEd 2d 3, (1973).

The Local Law in no way restricts its application to obscene exhibitions as might serve to remove the subject matter from the protection of the First Amendment. The Local Law cannot be construed in a manner which would avoid the constitutional issues. It is plainly couched in terms of malum prohibitum without regard to content of the dance.

As with the Local Law of the Town of North Hempstead, "the ordinance is so broad that it 'sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech.' THORNHILL v. ALABAMA, 310 U.S. 88, 97, 60 S. Ct. 736, 742, 842 L. Ed 1093 (1940)" SALEM INN, INC. v. FRANK, supra ___F. Supp. 2nd___

POINT III

THE NEW YORK COURTS HAVE NOT LIMITED OR CLARIFIED THE LOCAL LAW IN QUESTION SO AS TO NARROW ITS APPLICATION TO AREAS OF PROPER LEGISLATION NOR CAN THEY DO SO

Appellants contend that the Local Law has been construed so as to narrow its effect to objectives within the powers of a town to constitutionally regulate.

PEOPLE v. HARDY, cited by the Appellant on page 13 of their brief, Appellate Term, Second Department, N.Y. Law Journal, June 5, 1974, p. 19, column 1, applied only to that portion of Penal Law 245.01 which applied to the State's prohibition against appearing without a covering over a female breast in public and which contained the express provision that it should not apply to a play or a performance or exhibition and can in no way be considered as limiting the broader ordinance before the Court. To apply such limitation to local law before the Court does violence to the clear terms of the ordinance.

The first portion of Penal Law 245.01 as refers to the state policy of prohibiting such public appearance with the express exception of entertainment, exhibitions or shows was construed in PEOPLE v. PRICE 33 NY 2d 831, 351, NYS 2d 973. The Court's limitation to topless waitresses of that portion of the statute cannot be applied to the local law which clearly on its face intends to and was intended to prevent topless en-

tertainment in all shapes and forms.

J.D.H. REST, INC. v. NEW YORK STATE LIQUOR AUTHORITY 28 A.D. 2d 531, 379 NYS 2d 975 affirmed without opinion 21 NY 2d 846, 288 NYS 2d 1003 in no way limits the application of Local Law No. 1. J.D.H. dealt with topless waitresses who served patrons, came in contact with them and created conditions which permitted licensed premises to become disorderly and was sustained on the authority of the enforcement of alcoholic beverage Control Laws, a matter which is in no way involved in the instant case. This Court, as previously noted with reference to the Town of Hempstead ordinance that such an ordinance is incapable of narrowing construction. The Court stated in SALEM v. FRANK, (2nd Cir), supra (slip op. at page 4413) "In other words, we are asked to abstain on the sheer speculation that state courts might interpret Local Law Number 1-1973 contrary to its explicit language, thereby removing the constitutional question." The instant statute has not been narrowed so as to eliminate the possibility of bringing within its ambit constitutionally protected forms of expression, and it certainly cannot be so construed. In finding the Town of North Hempstead ordinance a completely across the board prohibition, the Court stated in footnote #3,

> "In reaching such a conclusion, we need not determine that the actual dancing involved in Appellees' bars protected expression. At least with respect to First Amendment challenges even those litigants

> whose activities could be properly prohibited in a closely drawn statute may attack an over-broad statute on its face. GOODING v. WILSON 405 U.S. 518 (1972); COATES v. CINNCINATI, 402 U.S. 611 (1971) See also BROADRICK v. OKLAHOMA, 413 U.S. 601, 612 (1973). And clearly the ordinance as written here would encompass protected expression within its prohibition. Expressed on the record before us, moreover, we would tend to find that dancing here protected expression. First, as noted above, there is no claim that the dancing here was actually obscene. Compare CALIFORNIA v. LaRUE 409 U.S. 109, 111 (1972). Second, while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content, (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person, who, having worked overtime for the necessary wherewithal, wants some 'entertainment' with his beer or shot of rye."

Regardless of whether the Local Law is capable of a narrowed construction to preserve its constitutionality, it has not been so construed and therefore abstention is not justified because the highest state court has not construed the Local Law. WISCONSIN v. CONSTANTINEAU, 400 U.S. 433 (1971); SALEM v. FRANK (2nd Cir. Ct. of App.), supra.

It should be noted in passing that the statute is further in violation of the Fourteenth Amendment to the United States Constitution as discriminatory against women. There appears

to be no rational basis for the prohibition as to women and its lack of prohibition especially in view especially in view of the arrest under color of this statute of one "Barbara" LaFurge.[6]

No rational basis exists for any distinction between male and female dancers when, as shown in the facts of this case, the authorities could mistakenly arrest a male under the ordinance.

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[6]While the record is not clear as to the physical attributes of LaFurge, this writer can state from personal knowledge that the appearance of LaFurge from the waist up is indistinguishable from that of a female. If we must rely on the record which contains no physical description of LaFurge, the Court must come to one of two conclusions. Either that the arrest of LaFurge was harrassment or that LaFurge at least had the outward appearance of a female.

POINT IV

THE COURT BELOW PROPERLY REFUSED TO CONVENE A THREE JUDGE COURT

The Local Law in question does not involve a matter of Statewide application. The clear intent of the statute was to leave the matter to local authorities. Under Appellant's theory, every time a municipality passes legislation violative of constitutional provisions, a statewide application could be found in the local law when enacted under an express power to legislate on a subject.

It cannot be presumed that the State statute mandates legislation contrary to constitutional provisions. It must be interpreted as authorizing such legislation in a constitutional manner.

The fact that local legislation is enacted under the authority of enabling legislation does not bring the state statute into play. The anti-grouper legislation of the Village of Belle Terre was enacted under the grant of powers of Article 7, McKinney's Cons. Law, Book 63, Village Law. Section 7-700 authorizes "...For the purpose of promoting the health, safety, morals or the general welfare of the community..." regulation and restriction of "...density of population...use of buildings... for...residence." BORRAS v. BELLE TERRE 476 F 2d 806 (2nd Cir., 1973) reversed on other grounds ___U.S.___, 42 L. W. 4475. There it was held a three judge court is not required.

Where the statute is of local application a three judge court as provided in 28 USCA 2281 is not proper even though a state statute may be involved. MOODY v. FLOWERS 387 US 97 (1967); SPIELMAN MOTOR SALES CO. v. DODGE 238 US 89, 94 (1935).

The Supreme "...court has consistently construed the section (28 USCA 2281) as authorizing a three judge court not merely because a state statute is involved but only when a state statute of general statewide application is sought to be enjoined. ...The term statute does not encompass local ordinances or resolutions." MOODY v. FLOWERS, supra at P. 101.

Plaintiffs below in no way sought a determination of a state statute. The unconstitutionality of the Local Law does not affect PL 245.01 of the State of New York.

CONCLUSIONS

The Order of the District Court enjoining the enforcement of Local Law No. 1-1973 of the Town of Smithtown should be affirmed.

Respectfully submitted,

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WALTER G. STEINDLER
of counsel

[2]The history of the so called "Topless Ordinances" is well known in the County of Suffolk. Originally, Penal Law 245.01 and Penal Law 245.02 were enacted in order to prohibit a growing craze in California of presenting topless waitresses. See also PL 245.01 McKinneys Practice Commentary. Briefly, Section 245.01 prohibits the exposure of female breasts by a female in a public place. However, it exempted from this conduct any female entertaining or performing in a play, exhibition, show or entertainment. A companion Section 245.02 covers a person who promotes or conducts or manages such an appearance by a female. Again, the sub-division was not to apply to a situation where a female was entertaining in a play, exhibition, show or entertainment. Subsequent to the enactment of this Section, the Town of Smithtown adopted Local Law Number 2 of 1969 as well as did other towns in the State and in the County. Since the specific exemption as to performances, exhibitions, plays, shows or entertainment were contained in the original Penal Law, it was apparently felt that this was an area left open to the towns by the various towns and hence the enactment of the ordinances such as Local Law Number 2 of 1969 of the Town of Smithtown which purported to prohibit the exposure of a female as defined by 245.01 or such promotion as defined in 245.02 as applied to live public

shows. However, these ordinances were short lived as a result of TOWN OF BABYLON v. CONTE, 61 MISC 2d 626, 307 NYS 2d 735; PEOPLE v. CONTE, 64 MISC 2d 753 315 NYS 2d 348 and 1969 OP. ST. COMPT No. 470, all of which held that the state had pre-empted the field and that the town ordinances were in fact contrary to state law.

Thereafter, both Sections of the Penal Law were amended to add as to both sections:

> "Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting the exposure of a female substantially as herein defined in a public place, at any time, whether or not such female is entertaining or performing in a play, exhibition, show or entertainment."

This amendment to the Penal Law was approved on March 2, 1970, but by the terms of the act, Chapter 39 of the Laws of 1970 which enacted the change, was not to go into effect until September 1, 1970. The Town of Smithtown, acting with undue haste in its effort to place a"Topless Ordinance" upon its books, enacted a Local Law Number 2 of 1970 on August 4, 1970. Thereafter, the Local Law Number 2 of 1970 was declared invalid as a result of its having been adopted prior to the effective date of the enabling legislation. PEOPLE v. PATRICIA COSTELLO, ROSLYN SIPE and JAMES FRANCIONE, Dist. Ct. Suffolk CL. CECR 3140 A & B-1972.

The Town of Smithtown remained undaunted and Local Law 1-1973 was adopted on January 23, 1973. Section 245.01 of the

Penal Law as originally enacted "specifically permits entertainment and performances by unclothed actors limited only by the prohibition not consist of a lewd act or be done in a lewd manner." TOWN OF BABYLON v. CONTE, supra 307 NYS 2d at P. 738. Because of the apparent permission throughout the State of topless performances, the amendment added in 1967 was apparently intended to remove the statute itself as a bar to municipal regulation.

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 8 day of Oct. , 1974 deponent served the within Brief upon Howard Pachman

attorney(s) for Appellant

in this action, at 6143 Jericho Tpke.
Commack, N.Y.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
8 day of Oct. 1974

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976